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IN THE

Supreme Court of the United States

October Term, 1941.

No. 327

ISABELLE HAMMOND-KNOWLTON, as Administratrix *cum testamento annexo de bonis non* of the Estate of CHARLES C. KNOWLTON, deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA, as substituted defendant for THE HARTFORD CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, Executor u/w ROBERT O. EATON, deceased, former Collector of Internal Revenue,

Respondent.

Petition of Isabelle Hammond-Knowlton, Admx., Etc., Plaintiff-Appellee Below for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

RUDOLPH L. VON BERNUTH,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No.

ISABELLE HAMMOND-KNOWLTON, as Administratrix *cum testamento annexo de bonis non* of the Estate of Charles C. Knowlton, deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA, as substituted defendant for THE HARTFORD CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, Executor u/w Robert O. Eaton, deceased, former Collector of Internal Revenue,

Respondent.

PETITION OF ISABELLE HAMMOND-KNOWLTON, ADMX. ETC., PLAINTIFF-APPELLEE BELOW FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of the Matters Involved.

The petitioner prays for a writ of certiorari to review the determination of the Circuit Court of Appeals for

the Second Circuit, reversing the judgment of the District Court of the District of Connecticut entered on the 2nd day of October, 1940, for the sum of $10,000 in favor of petitioner and against the United States of America after a retrial of an action at law for money had and received commenced by the petitioner on March 1, 1933, by service of process on Robert O. Eaton, Collector of Internal Revenue for the District of Connecticut named as sole defendant therein.

The proceedings leading up to the institution of said suit and taken thereafter to the present are as follows:

On or about December 29, 1931, petitioner filed with the Commissioner of Internal Revenue a verified statement asking that the audit and review of the estate tax return for determination of the estate tax liability of the estate of said Charles C. Knowlton under the 1924 Revenue Act be continued in order that the Commissioner might pass on the proof therewith submitted of the actual and complete payment of Connecticut State inheritance taxes, so as to entitle her to a credit against said tax liability to the extent of 25% thereof, as provided by Section 301 (b) of said Revenue Act, and requested a refund thereof for the reason that said estate tax had been theretofore determined by the Commissioner in the amount of $59,155.51 and paid in full to the said Collector of Internal Revenue, and a sum largely in excess of $14,788.88 (25% of $59,155.51) had thereafter been paid to the State of Connecticut on account of State inheritance tax.

Under date of July 6, 1932, the Commissioner rejected petitioner's claim for refund—not for insufficiency of proof but on limitational grounds, viz:—that the payment of the Federal tax having been made in 1925, her claim was barred by Section 3228 of the Revised Statutes.

Thereupon suit was instituted.

The cause was tried before Hon. Carroll C. Hincks, D. J., who rendered his decision in favor of plaintiff, judgment being entered April 30, 1936, for $14,788.88, the amount of the statutory credit.

An appeal was taken by the defendant-executor to the Circuit Court of Appeals and the judgment was reversed on the ground that the action was not maintainable against the Collector, but a new trial was ordered to allow the plaintiff to prove the limitational effect of the Commissioner's regulations governing the submission of proof in connection with the allowance of the mandatory statutory credit. The order for new trial was entered on April 30, 1937. A petition on behalf of plaintiff for rehearing of said appeal was denied on May 3, 1937.

On or about July 1st, 1937, plaintiff filed with this Court her petition for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, together with transcript of record from which it appeared that a new trial had been ordered. Said petition was denied on October 11th, 1937 (302 U. S. 707).

Thereafter, on June 2, 1938, an order was entered substituting *nunc pro tunc* the United States of America as defendant in the place and stead of said deceased Collector's legal representative. The complaint was amended to reflect said substitution and the *ad damnum* reduced to $10,000.

The cause was retried on February 2, 1940, before Hon. Carroll C. Hincks, D. J., who again rendered his decision in favor of plaintiff, ruling that the claim for credit and refund as aforesaid, received by the Commissioner on December 29, 1931, was a timely compliance with said Section 3228, Revised Statutes, and directed judgment for this petitioner in the sum of $10,000 and interest from October 2, 1940, the date of the entry of said judgment.

An appeal was taken by the defendant herein to the Circuit Court of Appeals and on May 22, 1941, duly came on for argument before their Honors, Swan, Chase and Frank, Circuit Judges. Subsequently, and on the 24th day of June, 1941, an opinion was handed down, per Frank, C. J., reversing said judgment.

On July 8, 1941, a petition on behalf of said appellee was filed by her counsel asking for a rehearing of said appeal. Said petition was denied on July 21st, 1941. The order for mandate was entered July 21st, 1941.

The Circuit Court of Appeals, affirming the correctness of their decision on the prior appeal, *i. e.,* that the action was not maintainable against the Collector, has reversed the current judgment on the ground that the amendment of the complaint by the substitution of the United States as defendant and the reduction of the *ad damnum* to comply with the jurisdictional limits of the Tucker Act, 24 Stat. 505, constituted the bringing of a new action which was barred by the Statute of Limitations.

It is for review and correction of both holdings that this petition is presented.

Reasons for Allowance of Writ.

It is submitted that the determination of the Circuit Court of Appeals in effect holding that a suit, in which the Collector of Internal Revenue is named as sole defendant, for the recovery from the United States of an overpayment of estate tax made to that officer, is based on his personal liability and that the amendment of the complaint by the substitution of the United States of America as defendant, under the circumstances as disclosed by the record herein constituted the bringing of a new action, is erroneous and that the errors are such as to invoke a corrective exercise of the discretion of

this Court upon one or more of the grounds suggested in Rule 38, paragraph 5, subdivision "B", viz:

(1) That the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter;

(2) has decided an important question of Federal law which has not been, but should be, settled by this Court, and

(3) has decided an important Federal question in a way probably in conflict with applicable decisions of this Court.

It is also submitted that the prior determination of said Appellate Court on the former reversal, holding that the action was not maintainable against the Collector, was erroneous in that it failed to adhere to the principle enunciated by this Honorable Court in cases which will be cited in the accompanying brief, viz: That a suit against a Collector of Internal Revenue is remedial only; is not based on an assertion of right (cause of action) against such officer to enforce a demand to which he must respond, but is afforded to the taxpayer by R. S. Section 3220 in order to recover from the United States moneys paid to the Collector for account of the United States Treasury.

On account of present day procedures in the liquidation of tax liability, the case at bar is one of novel impression and the legal conclusions deducible from the record require consideration and determination by the Court of last resort.

Furthermore, Judge Frank, in his carefully considered opinion, has said:

> "We, therefore, conclude reluctantly, that, if appellant (~~sic~~) is to be successful, it must be by direction of the Supreme Court and not by ours. Because the matter is of general importance and

not entirely free of doubt we feel it appropriate to set forth in some detail the bases of our conclusion."

Therefore, an exposition by this Court of the true function of a taxpayer's suit in which the Collector is sued as the nominal defendant only, is essential to the proper dispensation of justice in the case of your petitioner and other taxpayers who may be similarly situated.

Prayer for Relief.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings had herein in the said Court, and that the said determination of the United States Circuit Court of Appeals for the Second Circuit be reversed in respect of its determination that the action in which the Collector was originally named as sole defendant was barred by the Statute of Limitations, because the substitution of the United States and the reduction of the *ad damnum* constituted the bringing of a new suit; to the end that the judgment rendered by the District Court in favor of petitioner be affirmed in the principal sum of $10,000 and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper, and your petitioner will ever pray.

Dated, July 29, 1941.

ISABELLE HAMMOND-KNOWLTON,
Petitioner.

RUDOLPH L. VON BERNUTH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

ISABELLE HAMMOND-KNOWLTON, as Administratrix *cum testamento annexo de bonis non* of the Estate of Charles C. Knowlton, deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA, as substituted defendant for THE HARTFORD CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, Executor u/w Robert O. Eaton, deceased, former Collector of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, per Frank, C. J., handed down June 24, 1941, not yet reported will be found in the record herewith.

The memorandum decision by Thomas, D. J., denying defendant's motion to dismiss, will be found at T. R. page 48.

The memorandum opinion of Moskowitz, D. J., refusing to review orders of a judge of co-ordinate jurisdiction, will be found at T. R. page 51.

The decision of Hincks, D. J., the trial judge, directing entry of judgment will be found at T. R., pp. 59-69. None are officially reported.

The opinion of the Circuit Court of Appeals, per Manton, C. J., handed down April 5, 1937, reversing the first judgment entered April 30, 1936, is reported in 89 Federal Reporter (2nd) 175.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 [a]), providing for the issuance of writs of certiorari to review the decree of the Circuit Court of Appeals.

The order for mandate was issued July 21, 1941, and this application for appeal will be presented prior to July 31, 1941.

Statement of Facts.

Charles C. Knowlton died October 12, 1924, resident in Connecticut. On or before October 10, 1925, the sum of $59,764.55, on account of the (estimated) Federal estate tax liability as disclosed by the executor's return, was paid to the Collector of Internal Revenue for the District of Connecticut. The Connecticut State inheritance tax on Mr. Knowlton's estate was paid to the State of Connecticut as follows: On April 12, 1927, $72,372.21 on account of the then undetermined State inheritance tax; on October 16, 1930, $278.78, balance of said tax as finally determined.

The Commissioner audited the return and on October 21, 1926, determined the total basic tax at the sum of $59,155.51, advising the taxpayer by letter of this determination.

On December 29, 1931, the plaintiff, as required by Article 9 of Treasury Regulation 68, filed with the Commissioner proof of the complete liquidation on Octo-

ber 16, 1930, of such Connecticut State tax, and requested that the 25% statutory credit for State inheritance tax actually paid be allowed, the final tax liability of the taxpayer determined and the amount of the overpayment, thereby resulting, refunded.

On July 6, 1932, the Commissioner of Internal Revenue characterizing the documents filed December 26, 1931, as a "claim for refund," rejected same on the ground that Section 3228 of the Revised Statutes provides that claims for the refund of an erroneous tax or an excessive sum in any manner wrongfully collected should be filed within four years after the payment of the tax or sum sought to be recovered. On February 4, 1933, he refused to reopen the claim for the same reason.

On March 1, 1933, suit was instituted, Robert O. Eaton, the Collector of Internal Revenue, to whom said payment of $59,764.55 had been made when the return was filed, being named as sole defendant in his official capacity.

The complaint was for money had and received alleging overpayment of $15,397.92, such amount being the difference between $59,764.55, the amount paid, and $44,366.63, the amount of the determined tax of $59,155.57 less the 25% credit of $14,788.88 allowable under the Statute (Revenue Act of 1924, Section 301 [b]). Judgment was demanded of the defendant in such amount.

Issue having been joined by answer interposed on behalf of said defendant, the cause came on to be heard before District Judge Carroll C. Hincks on stipulated facts, trial by jury having been waived. The Court held that on the record the plaintiff had satisfied the requirements of Sections 3228 and 3226 of the Revised Statutes with respect to the claim for credit of $14,788.88, but that with respect to the balance sued for of $609.04 the claim therefor had not been filed within due time.

Judgment for $14,788.88 in favor of plaintiff was entered April 30, 1936. The government's appeal therefrom came on for argument on March 10, 1937, and said judgment was reversed, a new trial being ordered by mandate entered April 30, 1937.

Judge Manton, having held that the action was not maintainable against the Collector, substitution of the United States of America as defendant was effected *nunc pro tunc* by order dated June 2, 1938; the complaint amended to reflect such substitution and the amount alleged to be owing from the United States reduced to $10,000 to comply with the jurisdictional limits of the Tucker Act (28 U. S. C. A., Section 41 [20]).

Issue being joined by answer to amended complaint, the cause was in accordance with said mandate retried before Judge Hincks, who was given the judgment for $10,000 from which the government has successfully appealed.

Specification of Errors.

The Circuit Court of Appeals *erred:*

1. In holding that the substitution as defendant of the United States of America for the Collector of Internal Revenue constituted the bringing of a new action, as of June 2, 1938, the date of substitution, the Statute of Limitations thereby acting as a bar.

2. In holding that a suit against the Collector is based on the legal fiction that it is "personal" to him and in not holding that it is a remedy authorized by Statute to enable the taxpayer to recover his due from the United States.

3. In holding that the decision on the prior appeal, *i. e.*, that the petitioner could not have recovered judgment against the Collector, was correct.

4. It further erred in not affirming the judgment obtained below.

Questions Presented.

1. Whether, in view of the enactment of Revenue Acts providing that payment of estate taxes shall be made to Collectors of Internal Revenue for the purpose of discharging *pro tanto* a tax liability thereunder, prior to audit of the return by the Commissioner of Internal Revenue and his final determination of the amount of such tax liability (superseding the former procedure of assessment by the Commissioner of a tax in specific amount followed by issuance of warrant to the Collector to exact such tax), the Collector is merely a conduit whereby payments are received by the Treasury and that, therefore, his only personal accountability is to the United States.

2. Whether a suit by a taxpayer may be properly brought in the United States District Court for the recovery from the United States of a sum of money which the Court may determine is in excess of what the United States may lawfully demand or be entitled to, the complaint in such suit being *in assumpsit* for money had and received and judgment being demanded of the defendant sued, *eo nomine,* as payee only.

3. Whether a suit against a Collector of Internal Revenue as authorized by the provisions of the Act of July 13, 1866, 14 Stat. 111, *et seq.*, now found with immaterial verbal changes in Section 3220 of Revised Statutes, is a remedy given by Congress for bringing the government into court, or whether such a suit is the outgrowth of the various doctrines, devised in early times by the

Courts to do justice to taxpayers; viz: that such a suit is "personal" to the Collector, *i. e.*, that it is based on his personal responsibility and does not become a suit against the United States unless and until a certificate of the Trial Judge that he acted with probable cause is issued.

4. Whereas on the former appeal the Circuit Court has inclined to the view that to warrant a suit against a collector he must be the person who commits the act which is in derogation of plaintiff's rights, and mandated the cause for a new trial in order that the factual issue as to the meaning of Article 9, Regulations 68, governing the submission of proof of payment of State inheritance taxes for credit purposes be determined on such trial, and the plaintiff in compliance with such decision and mandate effected a substitution of defendant, reduced the *ad damnum* from $14,788.78 to $10,000 and brought the suit to re-trial on the same pleadings, does it accord with justice as deducible from a reasonable interpretation of the decisions of the courts, to hold that a suit against a collector and one against the United States on the state of facts identically proven in both trials, are distinct causes of action and that the substitution of the United States as defendant was the same as the bringing of a new and different suit which thereby became barred by the statute of limitations?

5. Finally, whether this Honorable Court having resolved the apparent conflict in the decisions cited in Judge Frank's opinion as applicable to the case at bar and having considered the authorities cited therein will determine that the petitioner is entitled to the relief as herein prayed for?

Argument.

The argument of the petitioner may be summarized in the following propositions:

1. The District Court is the proper forum for suit to adjudge allowance of the 25% statutory credit on account of State inheritance tax paid and to enter judgment for the over-payment of federal estate tax unlawfully retained, and it is by statutory authorization that the Collector of Internal Revenue to whom the payment was made is named as defendant, provided he is still in office. If dead or out of office, the United States, by virtue of the 1921 amendment to the Tucker Act (42 Stat. at Large 311; 28 U. S. C. A. §41 [20]), is the proper party.

2. Inasmuch as payment under protest is no longer a prerequisite to suit,* tax payments being made to discharge *pro tanto* a tax liability to be finally determined by the Commissioner after audit of the return, the acts of the Collector in receiving the return and accompanying payment are merely links in the chain of events leading up to the final settlement of the estate tax. The predication of illegality to the act of receiving the payment is not a condition precedent to suit against him when it subsequently appears that the government has been overpaid.

3. The *rationale* of a suit in the District Court for the recovery of estate tax over-payments, the payee Collector being named as sole defendant, is that it is a specific remedy given by Congress to recover from the Government the amount of tax unlawfully retained.

4. The Circuit Court of Appeals has interpreted recent decisions of the Supreme Court as reverting to the thesis that a suit against the Collector is "personal" in its in-

* R. S. 3226 (b).

cidents and has erroneously justified reversal of the judgment on such pronouncements.

5. If the first three propositions are, in the judgment of this Honorable Court, well founded in law, it will be competent for your Honors, after reviewing the transcript of record, to decree (1) that said determination of the Circuit Court of Appeals be reversed in respect of its opinion that plaintiff's action was barred by the Statute of Limitations and (2) to decide that the District Court on the evidence before it on the second trial and in conformity with Judge Manton's opinion in interpreting the applicability of R. S. §3228 correctly held that the claim for refund was timely filed with the Commissioner;—to the end that the judgment rendered by the District Court in favor of plaintiff be affirmed in the sum of $10,000.

POINTS.

I.

The suit is properly maintainable in the District Court against the Collector of Internal Revenue to whom payment was made and in office at the time of filing the complaint and the issuance of the precipe.

The Collector was named as sole defendant in a suit for money had and received on the authority of *Philadelphia v. Collector,* 5 Wallace Reports 720-736 (decided December Term 1866). This was the first case brought and decided after passage of the act on July 1, 1862, of Congress providing for the appointment of Collectors of Internal Revenue, and after the enactment of the provis-

ion now found in R. S. 3220 *(ante)*, authorizing suits against such officials. After referring to and quoting at length from the various sections of this legislation providing for the duty of Collectors appointed thereunder to pay over the amounts received by them into the Treasury of the United States (13 Stat. at Large 487) and adverting to the provision that the Commissioner be authorized to repay the amounts of judgments that may be recovered against collectors for any taxes collected by them, Mr. Justice Clifford, the writer of the opinion, says at page 731:

> "Necessary implication from those prov ions is that actions may be maintained against collectors of the internal revenue to recover back duties illegally or erroneously assessed. Authority is also conferred upon the commissioner (by Stat. at Large 239) not only to pay back all duties erroneously or illegally assessed or collected, but also all duties that appear to be excessive in amount and to repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them with costs and expenses of suit."

Further, on same page:

> "Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of *assumpsit* for money had and received."

Again at page 733:

> "Clear implication of the several provisions is that a judgment against the Collector in such a case is in the nature of a recovery against the United States and that the amount recovered is regarded as a proper charge against the revenue collected from that source."

It will be observed that suit must be brought against the Collector who received the tax payment. In that sense the suit is "personal" to him and has been so held where suits were brought against his successor in office, judgment being denied because the successor had no part in the transaction (*e. g., Smietanka v. Indiana Steel Co.*, 257 U. S. 1). If the Collector who received the tax payment died, suit was properly brought, or as in our case revived, against his legal representative. In 1921 an amendment to the Tucker Act *(supra)* permitted suit in the District Court against the United States when the Collector to whom payment was made is out of office at the time suit is brought and in such case the $10,000 limitation does not apply (*Lowe Bros. v. United States,* 304 U. S. 302).

Thus, in *Philadelphia v. Collector (supra),* the first case in which the right of the taxpayer to sue a Collector of Internal Revenue was challenged, the Supreme Court has unequivocally sanctioned such procedure as being authorized by statute.

As to its function remedially see Point III *(infra).*

II.

It is not a prerequisite to the maintenance of the suit that the payment be unlawful when made to the Collector.

Prior to the enactment of income and estate tax legislation which provided for payment of taxes in advance of official determination of the taxpapers' liability, taxes were assessed in specific amounts and warrants delivered to the Collector to exact payment by demand and, if necessary, distraint. Accordingly, it was incumbent on

the taxpayer who deemed the tax erroneous or excessive to accompany his payment with a protest as a prerequisite to suit. At the time when Judge Clifford wrote his opinion in *Philadelphia v. Collector (supra)* such situation existed so that his references to duties or taxes as being "illegally or erroneously assessed" and money as being "paid under protest" merely reflected the times. Were he writing his opinion under present day conditions he would use the word "overpayments" and eliminate "under protest." Now, payments made in advance of audit and final determination are merely *pro tanto* a discharge of liability and when such liability becomes over-discharged by excess payment or an allowable credit, a refund is the taxpayer's due. R. S. 3226 as amended by the Revenue Act of 1924 (Appendix, p. 25) providing that suits for the recovery of excessive payments may be maintained whether or not the sum has been paid under protest, is merely declaratory of a principle implicit in the change of procedure (*cf. Moore Ice Cream Co. v. Rose,* 289 U. S. 373 at 378; citing Senate report No. 398, 68th Cong. §1114).

III.

A suit against the payee Collector is remedial and not the assertion of a cause of action in which recovery from him is sought.

Reference has been made in Point I to the decision in *Philadelphia v. Collector (ante).* Four years later (1870) the case of *Collector v. Hubbard,* 12 Wallace 1, came before the Court. Mr. Justice Clifford's opinion from which we quote in full at page 13 is illuminating.

> "6. Prior to the passage of the Act of the 13th of July, 1866, it is quite clear that the taxpayer

> if he was illegally assessed might maintain an action of *assumpsit* against a Collector to recover back the amount if he paid it under protest, although he has not taken any appeal to the Commissioner of Internal Revenue.* Such were the views of this Court in the case of *Philadelphia v. The Collector* (5 Wallace 730), and no doubt is entertained that the decision was entirely correct, but it is a great mistake to suppose that the right to maintain the action as there conceded was founded in the theory that the Collector held money in his hands belonging to the plaintiff which he was bound to refund, as the decision was placed expressly upon the ground that the several provisions in the Internal Revenue Acts before referred to *warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.*" (Italics ours.)

Here in crystal-clear words is set forth the function of our suit. The conclusion is unescapable. This Court says in effect:

> The Act of July 13, 1866, authorizes the following remedy: The taxpayer after unsuccessful appeal to the Commissioner may sue the collector to whom he has made a tax payment and recover a judgment against him for all taxes that appear to be excessive in amount and when such judgment has been recovered and certificate of probable cause issued the Commissioner of Internal Revenue is authorized to satisfy it.

The *rationale* of that decision has been affirmed by Mr. Justice Cardozo's *dictum* in *Moore Ice Cream Co. v. Rose,* 289 U. S. 373, where, at page 383, he says:

> "* * *, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money

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* The reference to the necessity of appeal to the Commissioner is of course, *dictum.*

> over, in such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

a paraphrase to all intents and purposes of the principle enunciated by Judge Clifford over sixty years before.

IV.

The thesis that a suit against a Collector is personal in its incidents does not justify a holding that the substitution of the United States constitutes the bringing of a new action.

From a perusal of Judge Frank's opinion, it is evident he considers that a suit against a collector was a procedural fiction judicially sanctioned to do justice to the taxpayer, inasmuch as there then existed no statutory provision for a suit against the Government—this in spite of our citation on our brief in the Appellate Court of *Collector v. Hubbard* (*supra*), in which the *rationale* is definitely explained, i. e., that it is a remedy provided by legislative enactment.

Granted, that the action is so personal in its incidents, that a suit against a successor collector is not warranted: granted, that no claim can be made against the United States unless and until the trial judge issues his certificate of probable cause: granted, that until the 1921 amendment above referred to, extended the jurisdiction to suits against the United States, the deceased collector's personal legal representative and he only was suable—nevertheless and at all events the real cause of action was and still is against the person ultimately liable. Indeed, when we read Judge Frank's opinion so cogently urging that fictions, devised to do justice to the citizen,

should not be employed as instruments of unfairness directed against him, we cannot reconcile it with his conclusions that this alleged "ghostly fiction" has so much vitality that the substitution of the real party in interest for the nominal defendant works a change in the cause of action.

As the mandate directed a new trial, it was evident the Circuit Court considered that the plaintiff might prevail over the limitational defense to allowance of credit by proving what the Commissioner's regulations meant. It was also evident that if substitution of parties had been deemed by the Appellate Court as tantamount to bringing a new suit, the mandating of the cause for a new trial would have been nugatory as it would have inevitably rendered it subject to attack under the statute of limitations. It also precluded the plaintiff from then seeking an appeal to review the correctness of Judge Manton's decision that the suit was not maintainable against the Collector.

We would point out further that Judge Manton as he concludes his opinion has made a factual error in ruling that it was only the conduct of the Commissioner in "disallowing the credit" which has affected the appellee. The allowance or disallowance of a credit in accordance with the mandatory provisions of the statute depends on the sufficiency of proof submitted as to actual payment of State tax. Never has the sufficiency of plaintiff's proof so as to entitle her to the credit been questioned. The Commissioner merely rejected the claim as not timely filed, so that it was the rejection of the claim which affected the appellee and not a disallowance of credit.

It was on the basis of this inaccuracy of statement that the Government was enabled to plead in its answer (Paragraph 19 (d) Transcript of Record, p. 22), as follows:

"(d) The action, if maintainable against the United States in the District Court, must be confined to taxes collected by the Collector and the Circuit Court of Appeals for the Second Circuit in its opinion has ruled that the taxes herein sought to be recovered were not collected by the Collector, but that the collection thereof was effected through the conduct and acts of the Commissioner."

Plaintiff's right to sue the payee collector is in no way impugned by *Lowe Bros. v. United States* (304 U. S. 302), as that case simply held that in a suit against the United States, jurisdiction was not conferred by the 1921 amendment to the Tucker Act (*supra*) unless it appeared that the collector, since deceased or out of office, had actually made the collection, a bookkeeping entry in favor of plaintiff not being a sufficient compliance with the Act. It is an affront to reason and a blinding of one's self to realities to hold that the Commissioner, by rejecting solely on limitational grounds plaintiff's request that she be credited with, say $14,788.88, on the settlement of her account with the Government for estate tax liability, "collected" a tax amounting to $14,788.88.

The realistic approach to a modern tax case is that taxes are "received" by or "paid to" the collector; "determined" by the Commissioner, thereafter "assessed," "credited" or "certified as over-paid" as the case may be, and "discharged" by the taxpayer. The allowance of a credit is a discharge *pro tanto* of the taxpayer's liability. No longer is the sequence "assessment," "collection" and, if justified, "recovery of tax." The modern day procedures provided for the levying of tax by the government and the taxpayer's responsibility to such levy must control the courts in reaching a correct decision.

V.

CONCLUSION.

The minimum justice due plaintiff demands reversal of the determination of the Circuit Court of Appeals and affirmance of the judgment of the District Court.

The application for a writ of certiorari should be granted.

Dated, July 29, 1941.

Respectfully submitted,

RUDOLPH L. von BERNUTH,
Counsel for Petitioner.

EUGENE D. ALEXANDER,
with him on the brief.

APPENDIX.

Text of Statutes Cited.

Judicial Code, Section 240 (amended):

> (a) In any case civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ or error or appeal.

The Tucker Act (24 Stat. 505), as amended November 23, 1921 (42 Stat. 311), will be found in Section 24 (subd. 20) of the Judicial Code (28 U. S. C. A., §41), reading so far as material, as follows:

> "Sec. 24. The District Court shall have original jurisdiction as follows:
> (20) Suits against United States. Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * * in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive, or in any manner wrongfully collected under the internal revenue

laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax penalty or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Revised Statutes, Section 3220:

"Except as otherwise provided by law in the case in income, estate, and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector, the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the costs and expenses of suit; also damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Revised Statutes, Section 3226:

"(a) *Limitations*—(1) *Claim.* No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.* No such suit or proceeding shall be begun before the expiration of six months from the

date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

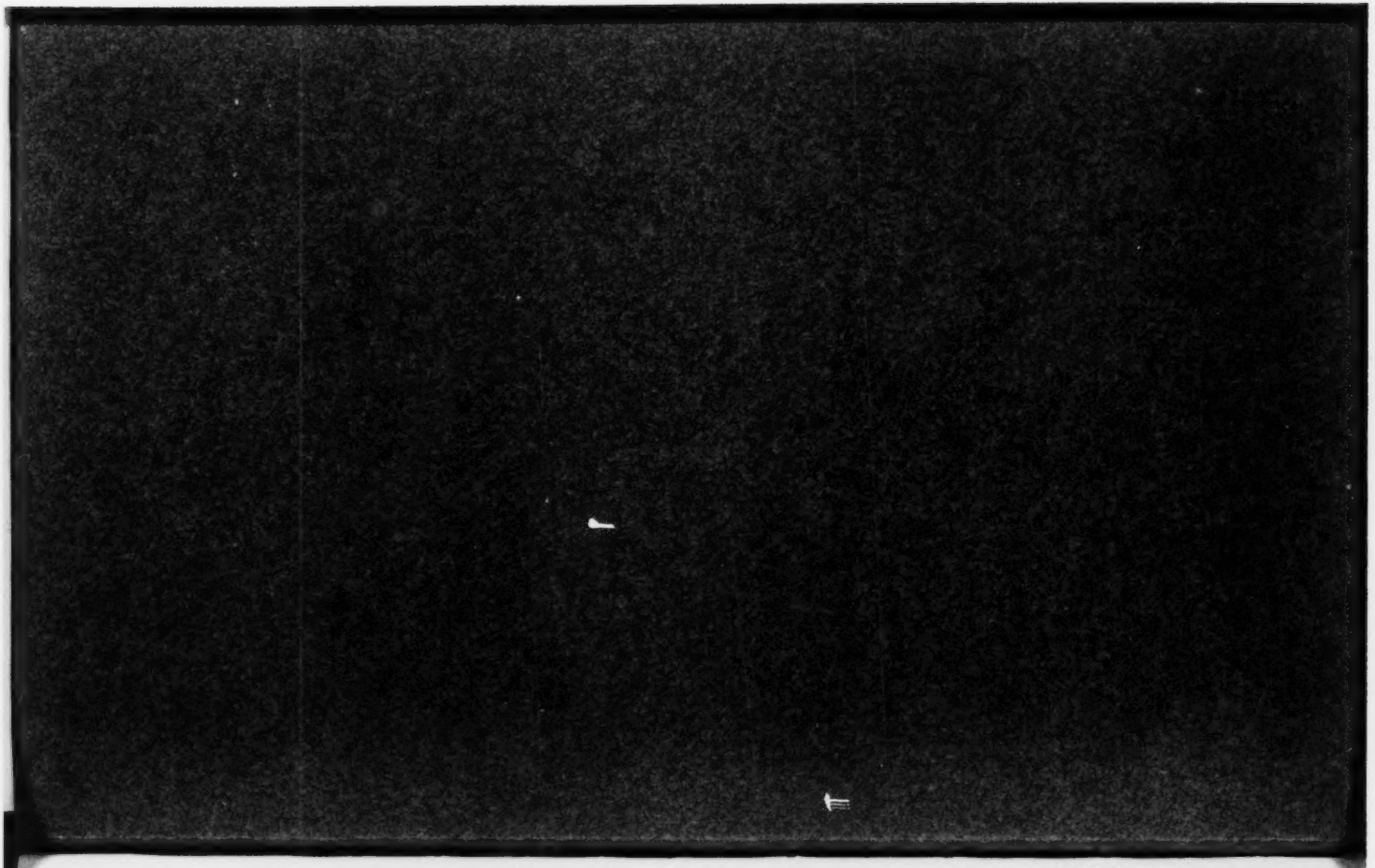
(b) *Protest or duress.* Such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

Revised Statutes, Section 3228:

"All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

Revenue Act of 1924, Title III, Estate Tax, Section 301(b):

"(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section."



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408756—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 327

ISABELLE HAMMOND-KNOWLTON, AS ADMINISTRATRIX *cum testamento annexo de bonis non* OF THE ESTATE OF CHARLES C. KNOWLTON, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA, AS SUBSTITUTED DEFENDANT FOR THE HARTFORD-CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, EXECUTOR U/W ROBERT O. EATON, DECEASED, FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Circuit Court of Appeals in this case is reported in 89 F. (2d) 175, and the denial of certiorari by this Court, in 302 U. S. 707. Subsequent unreported district court opinions denying the Government's motion to dismiss, its motion to vacate orders permitting amendments of

the complaint, and its motion for judgment are set forth in the record at pp. 48–50, 51–54, and 59–69, respectively. The second opinion of the Circuit Court of Appeals, (R. 79–106), is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 21, 1941 (R. 118). The petition for a writ of certiorari was filed on July 31, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Circuit Court of Appeals held that the taxpayer's suit for refund could not be maintained against the Collector, and this Court denied certiorari. Meanwhile, the statute of limitations had run on an action against the United States. The question is whether the taxpayer might nevertheless amend her complaint, *nunc pro tunc,* to substitute the United States as party defendant and to reduce the amount of the claim from $15,000 to $10,000, the jurisdictional limit of the Tucker Act.

STATUTES AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix.

STATEMENT

Charles C. Knowlton, the decedent, died October 12, 1924. On October 10, 1925, his administratrix

filed a return for federal estate tax purposes, showing a tax of $79,686.06, against which a credit of $19,921.51, 25 percent of the tax, was claimed for estimated state inheritance taxes as allowable under Section 301 (b) of the Revenue Act of 1924. The difference, amounting to $59,764.55, was paid on or before October 10, 1925 (R. 29–30). No part of these payments was excessive or in any manner wrongfully collected (R. 30).

The Commissioner made a final audit of the return and reported the results of the audit to the estate in a letter dated October 21, 1926. The audit resulted in an increase in the value of certain securities held by the estate. But in view of the fact that the rate of the tax had been reduced by Section 322 (a) of the Revenue Act of 1926, amending Section 301 (a) of the Revenue Act of 1924, the estate's tax was determined as $59,155.51, or $609.04 less than the amount paid (R. 32–33).

On April 12, 1927, the estate paid to the State of Connecticut the sum of $72,372.21, the amount due for state inheritance taxes as certified by the judge of probate. Three and one-half years later, on October 16, 1930, an additional $278.78 was paid. No other payments have been made on account of the state inheritance tax, and no further assessments have been made by the State of Connecticut for succession or inheritance taxes (R. 34).

On December 26, 1931, the taxpayer forwarded to the Commissioner a document labelled "Supple-

mental data on audit of return—Evidence for credit and refund," claiming a refund of $20,744.32 in federal estate taxes because of state inheritance taxes paid and submitting proof of payment (R. 33–34).

The Commissioner treated the document as an original claim for refund and rejected it July 6, 1932, because it had not been filed within four years after payment of the tax sought to be recovered. Revised Statutes, Section 3228, as amended by the Revenue Act of 1928, Section 619 (c). (R. 35.) He later refused to reopen the claim for the same reason (R. 40–42).

On March 1, 1933, suit was brought against the Collector and upon his death continued against his executor. Judgment was entered for the taxpayer in the amount of $14,788.88, representing the statutory credit of 25 per cent for state inheritance taxes paid (R. 1). On appeal the court below held that the suit against the Collector could not be maintained (R. 1); although it considered in inconclusive fashion the Government's contention that the claim for refund had not been timely filed, the opinion has now been construed as not passing upon that point. (R. 80). An order was entered reversing the judgment of the lower court, and remanding the cause for a new trial (R. 5). This Court denied certiorari.

Thereafter, over the objections of the Government, the district court permitted the taxpayer to

amend her complaint, *nunc pro tunc,* by substituting the United States as defendant and by limiting the claim to $10,000, and such interest as may be allowed by law (R. 7–12, 13–14, 27, 45–47). The district court ruled that the claim for interest referred only to interest after judgment (R. 68–69).

The case was retried upon an agreed statement, based on evidence introduced at the first trial (R. 28). It was further stipulated that the defendant had duly preserved its rights to have the propriety of all interlocutory orders reviewed on appeal (R. 44). The defendant's motion for judgment on behalf of the United States (R. 55–58) was denied, and judgment for $10,000, with interest after the date of judgment, was entered for the taxpayer (R. 70).

The court below reversed the judgment of the District Court on the grounds that the amendment could not be made after the statute of limitations had run.

DISCUSSION

The decision of the court below, that the amendment could not be made, revolves about the basic proposition that an action against the Collector of Internal Revenue is, under the decisions of this Court, probably to be considered "personal" in nature, separate and distinct from a cause of action against the United States. *Sage* v. *United States,* 250 U. S. 33; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; see *Sunshine Coal Co.* v. *Adkins,* 310 U. S.

381, 403; but cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. The Government recently sought review of this question in *United States* v. *Nunnally Inv. Co.,* No. 990, October Term, 1940, and the petition was denied May 26, 1941.[1] However, a petition for rehearing of that petition is now pending.

The decision of the court below is consistent in result with that of the Court of Claims in the *Nunnally* case and with this Court's denial of certiorari. The opinion, however, underscores the uncertainty which prevails on this question, and the importance to the orderly conduct of the Government's tax litigation that the question receive authoritative determination by this Court. If, therefore, the Court grants the Government's petition for rehearing in the *Nunnally* case, we do not oppose the issuance of a writ in this proceeding.[2]

If, on the other hand, the Court should deny our petition for rehearing in the *Nunnally* case, it would seem to follow that it sees no occasion to reexamine the existing rules as to the nature of the suit against the collector. In that event,

---

[1] This case was reported below at 36 F. Supp. 332 (C. Cls.).

[2] We should, however, urge that even if the actions against the Collector and against the United States be viewed as substantially identical, the taxpayer yet cannot recover because (a) the original claim for refund was not timely filed, and (b) the original suit was for more than $10,000 and thus, at least until the amendment of the complaint after the statute had run, was not within the jurisdiction conferred by the Tucker Act.

there is no basis for review of the instant case[3] and the taxpayer's petition here should likewise be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

AUGUST 1941.

[3] The original determination that the taxpayer could not sue the Collector is supported, as pointed out by the court below (R. 81), by this Court's subsequent decision in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

APPENDIX

Revenue Act of 1924, 43 Stat. 253:

SEC. 301. * * *

(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section.

* * * * *

SEC. 1011. Section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *."

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully collected must, * * * be presented to the Commissioner

of Internal Revenue within four years next after the payment of such tax * * * or sum."

* * * * *

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax * * * or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. * * *"

* * * * *

Subsequent amendments to Revised Statutes, Sections 3220, 3226, and 3228, contained in Revenue Act of 1926, Sections 1111, 1112, and 1113, and to Revised Statutes, Section 3228 in Revenue Act of 1928, Section 19 (c) are not relevant here.

Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * (U. S. C., Title 28, Sec. 41.)

Treasury Regulations 68, relating to the Revenue Act of 1924:

ART. 9. (a) *Credit for estate, inheritance, legacy, or succession taxes.*—Under the provisions of section 301 (b) the estate is entitled, under certain conditions, to a credit against the Federal estate tax for payments of estate, inheritance, legacy, or succession taxes actually made to any of the several States, Territories, or the District of Columbia.

This credit applies only to the estates of persons dying after the effective date of the Revenue Act of 1924, and is limited to 25 per centum of the Federal estate tax. No credit may be taken or allowed for any part of such taxes unless the property in respect to which such taxes were imposed is included in the gross estate of the decedent for Federal estate tax.

The Federal estate tax is due and payable one year after the date of decedent's death, and in making payment of the amount shown by the return to be due the executor may claim credit, subject to the approval of the Commissioner upon audit of the return, of an estimated amount of any such taxes for which the estate will ultimately be entitled to a credit, and pay the balance of the tax disclosed by the return. Where, however, such taxes have been paid prior to the date of payment of the Federal estate tax indicated by the return, the amount thereof actually paid, but not in excess of 25 per centum of the Federal estate tax, should be claimed. Where the executor, in filing the return and discharging the tax indicated thereby, takes credit for any such taxes which are not thereafter paid prior to the final audit of the return, or where the Commissioner determines that such taxes, or any portion thereof, are not an allowable credit within the meaning of the statute, then such credit or portion thereof taken by the executor at the time of paying the tax as is not allowed by the Commissioner should be paid promptly, together with interest thereon, if any has accrued. (See Art. 83.) The executor should exercise care to see that he does not claim a credit in excess of the correct amount.

Where credits are allowed they will be applied against any unpaid tax, and if there then remains an amount not so applied the executor should file a claim for the refund of the amount of the Federal estate tax by which the credit exceeds the unpaid tax, or if the entire Federal estate tax has been paid, a claim for refund should be filed for such portion thereof as results from the allowance of the credit.

Before the Commissioner allows credit for any estate, inheritance, legacy, or succession taxes, there must be submitted to him a complete list of the property in respect to which any such taxes were imposed, and the amount thereof paid, certified under the hand and official seal of the officer of the taxing State or Territory having custody of the records pertaining to such taxes. If such officer has no seal, his official position should be established by the submission of a certificate of the proper authority of the taxing State or Territory. The certificate of the officer having custody of the records referred to must set forth the name of the decedent, the date of his death, and show whether a refund of such taxes, or any part thereof, has been authorized, and whether any claim therefor is pending. If any refund has been made the date, amount thereof, and a description of the property or interest in respect to which such refund was made must be shown in such certificate. In addition to such certificate, the executor must submit his affidavit stating whether any litigation has been instituted, or appeal taken, or any such action is designed or contemplated by him, or, to his knowledge, by any beneficiary or other person, the final determination of which may affect the amount of such taxes. The certificate of the officer having custody of the records referred to, and the affidavit of the executor, should be filed with the return, but if that is not convenient or possible, then they should be transmitted direct to the Commissioner.

Where, subsequent to the allowance of a credit by the Commissioner, a refund is made of any such estate, inheritance, legacy, or succession taxes, the executor, or if the re-

fund is made after the executor's discharge, then any person or persons to whom the refund is made, is required to advise the Commissioner of the date of the refund and the amount thereof, furnish the Commissioner with a description of the property or interest in respect to which the refund was made, and pay the Federal estate tax, if any, due as a result of such refund, together with interest.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941